SUPREME COURT OF THE UNITED STATES.

OCT. TR., 1878, No. 230.

THE NEW YORK CENTRAL & HUDSON RIVER R.R. CO.,
PLAINTIFF IN ERROR,

vs.

OLGA DE MALUTA FRALOFF, RESPONDENT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT IN ERROR.

Supreme Court

OF THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE NEW YORK CENTRAL AND HUDSON RIVER R. R. CO.,
(Deft.) Plaintiff in Error,

vs.

OLGA DE MALUTA FRALOFF,
(Plff.) Respondent in Error.

Brief and Points for the Respondent in Error.

STATEMENT.

This appeal is from the verdict of a jury, giving damages against defendant, a common carrier, for the loss of the baggage of plaintiff, a passenger.

The defendant in error, a Russian lady of wealth and high social position (fols. 32, 49, 50, 64, 65, 66 and 109), being in delicate health (fols. 30, 51, 71), in the fall of 1869 was travelling in this country with a relative, Count Von Webber, for pleasure and the benefit of her health (fol. 30), intending possibly an extended tour (fols. 30, 31, 35 and 51).

In her travelling baggage she had some valuable family laces, which had long been used in her attire (fols. 32 to 39, 52, 67, 68, 69, 71, 72), and which were in a trunk delivered by her to the plaintiff in error at Albany, to be transported to Niagara Falls on the same train on which she went as a passenger, on the 4th day of November, 1869 (fols. 30 to 33, 52, 73).

On the arrival of the train at Niagara Falls, the trunk containing these laces was found broken open, the locks torn off and hanging, and its contents so upset as to prevent its being closed (fols. 52, 53, 73, 74), and the laces in question had been stolen therefrom (fols. 53 and end of 31).

The usual fare was paid by the defendant in error, and the trunk was received and checked in good order by the company at Albany (fols. 31, 52, 73). The defendants, it was admitted (fol. 74), were common carriers of passengers and freight for hire. The value and market value of the goods taken were proved to an extent greater than the value as found by the jury (fols. 78 to 91, also 107). The jury on the 15th day of January, 1875, on a second trial, and more than four years after the taking of the goods, returned a verdict in favor of plaintiff below for $10,000, *without interest* (fols. 22, 134).

1st Point.—The first exception taken by defendant will be found at fol. 28.

Objection was made to the reading of the depositions of the plaintiff, taken *de bene esse*. The objections are nine in number, from fol. 25 to fol. 29.

The Court overruled the motion on the trial for the exclusion of the depositions, among other grounds that the motion should have been made before trial (fol. 28).

It is well settled that objections of this character—*i. e.*, to the form or execution of the officer's certificate—where the deposition or commission has been on file before the trial, must be made before the trial or not at all.

It would have been a great hardship in this case to have those depositions suppressed on the trial, when they were the main testimony of the plaintiff, who was an inhabitant of Russia, and for all that appears in that country at the time of trial.

See Winans *v.* N. Y. & Erie R. R., 21 How. 88, U. S.
Sheldon *v.* Wood, 2 Bos., 267.
Burril *v.* Watertown Bk., 51 Barb., 105.
Doane *v.* Glenn, 21 Wall., 33.

A recent case (1877) in the N. Y. Court of Appeals, reviewing prior cases on this head, holds in these words: "An objection to evidence taken under a commission, that the commission *was not executed by the person intended*, should be raised by *motion to suppress*, where the party has opportunity so to do."

Newton *v.* Porter, 69 N. York, 133.

Now, it appears that the date of the trial was 6 Jan., 1875 (fol. 24), and the deposition was taken March 2d, 1870 (fol. 40), nearly five years before the trial.

This entire question is set at rest in this Court, however, by the decision of this Court in the case of Doane *v.* Glenn, on appeal from the 1st District of Colorado. In that case Mr. Justice Swayne states: "When such objections "are withheld until the trial is in progress, "they must be regarded as waived, and the "deposition should be admitted in evidence. "This is demanded by the interests of justice. "It is necessary to prevent surprise and the "sacrifice of substantial rights. The settled "rule of the Court is in accordance with these "views."

Rule 113 of the Circuit Court requires notice in writing to be given in two days after filing, otherwise objections to form and manner are waived.

It will be observed that the objections raised, when not frivolous, were of a purely tecthical character.

As to some, the Error Book does not show that the grounds of the objections existed as a matter of fact; and this Court will not accept assumptions or travel beyond the Error Book.

One frivolous exception, as to the plaintiff's name (fol. 25), is answered in her deposition at fol. 39, showing that her name was both Olga and Barbara. Another frivolous exception was that in one of the counts of the declaration she was by the pleader, *ex abundantia cautelâ*, designated as an unmarried woman.

Moreover, it appears (fol. 43) that the deposition was read over to the witness for her signature *by consent of the defendant's counsel.* This answers the exception to the deposition that

the commissioner did not caution the interpreter, &c. Besides that, everything required by law is supposed to have been by the commissioner in the discharge of his duty.

Defendant also makes some obscure objections (fol. 27) as to certain Exhibits not being attached to the deposition; and in that connection alleges facts which nowhere appear in the Error Book as such.

There is nothing in the Error Book to show that the samples were made Exhibits, or were annexed to the depositions when they were filed. They were offered in evidence before the Commissioner, and objected to (fol. 40) by the defendant's counsel, and, so far as the Error Book shows, were not offered in evidence, or exhibited on the trial. How can the plaintiff in error properly except to the non-introduction of testimony to which he objects? There is a statement at fol. 45, that certain laces were all in a box, and temporarily kept during the examination in the custody of the plaintiff, being very valuable pieces of lace. In fact, the Commissioner refused to receive and keep them, on account of their value.

Besides all the above, the rule is that plaintiff in error should have objected to the Exhibit not being annexed at *the time of the examination* before the Commissioner, under the principle that if a party against whom the witness is examined attends the examination, and is at the time aware of facts relied upon to show the witness incompetent, he should take the objection at the time, and his failure to do so is a waiver of the objection.

U. S. *v.* Hair Pencils, 1 Paine, 400.

Depositions cannot be suppressed at the trial on the ground of omission to annex a document.

Winans *agst.* N. Y. & Erie R. R., 21 How., 88.

A party is not obliged to annex original papers of value, and risk their loss by annexing them to a commission.

Com. Bank *v.* Union Bk., 16 New York, 203.

Objections to particular parts of a deposition are no ground for excluding the whole, and if any part of a deposition is competent the objection should be confined to that which is not so; *e. g.*, if the samples were not included, then testimony as to samples might be excluded if they were not annexed to the commission, or exhibited at the trial.

Com. Bk. *v.* Union Bk., 11 N. Y., 203.

In this case the Error Book shows no testimony given as to the samples on the trial. They were not offered in evidence on the trial.

Apart from the above, there is other sufficient evidence as to the laces lost and their quality. If any definition or piece of evidence might be held technically incorrect as presented, if there was other sufficient evidence, the verdict will not be disturbed.

Steamer Webb, 14 Wal., 406.
Gregg *v.* Morse., *ib.*, 564.

2d Point.—Defendant's counsel excepted to the refusal of the Court to exclude the lock and trunk (at fol. 39) when offered as exhibits.

The trunk showing the condition of the lock as it was found at Niagara, the place of destination, was part of the *res gestæ*, particularly when the sound condition of the lock and trunk was testified to by witnesses at Albany, whence it started on the journey in custody of defendants (fol. 73, 52).

The trunk and locks were proper exhibits, corroborative of the testimony as to the *res gestæ*.

3d Point.—The next series of exceptions are found at fols. 41 to 42.

Questions were put by plaintiff's counsel to the plaintiff to show the nature and condition of these laces; that they had been habitually worn and arranged by plaintiff as articles of personal attire and apparel, as distinguished from articles for traffic or sale; and as to plaintiff's social condition and station in life, and as to her being a traveller in the country and not a dealer in the lost articles, carrying them as merchandise. All which questions were proper and necessary in order to establish the rate of damages the plaintiff was entitled to recover, under the principles of law applicable to the plaintiff's case.

4th Point.—Exceptions were taken (fol. 48 to 50) to the testimony of the Russian Consul-General as to the social position and character of the plaintiff.

These questions were proper, particularly as all through the trial the defendant claimed or insinuated that the plaintiff herself stole the laces, and was not in a grade of life which would warrant her travelling with articles of such value; and also, to prejudice the jury, made insinuations as to her character and conduct. Some of the contemptible testimony of this character offered will be found at fol. 96 to 100.

If any of the special questions excepted to might be considered in any way objectionable in form, the same subject-matter, viz., as to the condition in life, is abundantly proved by other witnesses, and the introduction or exclusion of the testimony in question would be immaterial.

5th Point.—Exceptions were taken (fol. 58) to the reading of depositions on commission in Russia, and to the testimony of an interpreter translating them.

The objections were 18 in number. Some of them were as follows:

1st. That the answers were in the Russian language.

2d. That the witness did not swear to the translation.

3d. That it would be expensive to translate the commission.

4th. That the commission was executed by the two persons to whom it was directed, instead of one in the alternative.

5th. That it does not distinctly appear by whom the oath was administered to the witness.

Another objection, of a like technical character, was that it did not appear that witness was cautioned or the testimony reduced to writing in his presence; that it does not appear that the interpreter was cautioned; that the defendant cannot read the answers to the cross-interrogatories, and a variety of other objections of the same technical character.

These objections run from fol. 57 to fol. 61. Also a similar objection, fol. 108.

The first answer to these objections is the same as the answer to objections to plaintiff's deposition, viz.: That they should have been taken preparatory to trial, and not on the trial, when it was impossible for plaintiff to procure testimony to the same point.

Another answer is that there is nothing in Error Book to show that the facts on which the objections were urged existed in fact.

All that Error Book contains is a statement of the counsel's objections, and his assertions of fact on which they are based.

There is nothing to show that the grounds of objections existed, and they are denied.

The only fact gathered is, that the deposition was in the Russian language (fol. 57), and was offered to be translated on the trial through a sworn interpreter (fol. 57).

There is also the fact (fol. 67) that the deposition is "*signed*" by both Commissioners, to whom it is addressed in the alternative.

It does not appear that the deposition was taken by more than one Commissioner, and consequently the signing by both was mere surplusage, and could do no harm.

See also the case of Newton *v.* Porter, 69 New York, 133, holding that a commission executed by a wrong person was no objection at the trial.

6th Point.—Various exceptions were taken to answers of Russian gentlemen acquainted with the plaintiff, testifying to her means, station and position in life (fols. 62 to 67).

This testimony was proper and necessary for the plaintiff's case, as is shown under succeeding points.

7th Point.—Exceptions were taken (fol. 69) to Mrs. Horn's testimony as to what she saw of the laces, in New York, before the journey.

It was necessary and proper to show that the plaintiff did own these laces, and had them with her before the journey; particularly as

the defendant denied that the plaintiff had them —*vide* answer (fol. 20), containing general denial of all the allegations of the complaint.

8th Point.—Questions were asked Toucey, Superintendent of the Railroad, but not shown to have any connection with baggage or passenger business, as to what *he* would have done under certain supposititious circumstances; and offers were made, and excluded, to show by same witness what, under certain *supposed circumstances, defendant would* have done; and what the average value of trunks carried on defendant's road was, and what was the custom of defendant on a declaration of value (fol. 75 to 78). All such customs, if any existed, would have been absurd, and could not vary rights of travelers or the legal obligations of carriers.

The testimony offered was immaterial and irrelevant, and had nothing to do with the facts of this case, and was properly excluded.

9th Point.—Exceptions from fols. 78 to 92: On plaintiff's offer to prove the value of laces, of the kind and manufacture of those which had been lost, defendant made objection that experts as to the value could not be examined because the laces themselves, or samples, were not produced.

It fully appeared that the laces were of a defi-

nite character, well known in the trade by their descriptive name, and the precise dimensions of those lost was fully testified to (fols. 32 to 35).

If the defendant had not taken the laces we could have produced them. As it was, the plaintiff described the laces, which was the best she could do; she was not obliged to hunt up and purchase samples at a costly price, and leave them for an indefinite time to the mercies of the Clerk's office.

The well known case of Armory *vs.* Delamire, 1 Smith's Leading Cases, 151, fully answers these exceptions. The legal maxim applies here, *Omnia præsumuntur contra spoliatorem*, even if no testimony, *pro* or *con*, as to value had been adduced.

See Bailey *vs.* Shaw, 4 Foster, N. H., 297.

There was complete evidence of much greater value than as found by the jury.

There may be not a *general market* for such laces at *Niagara*, or at any other special place, any more than there would be a *general* market for any other articles of made-up clothing taken or destroyed by a carrier. But does that prevent proof of their value?

A *general* market value or price for laces of this character was fully proved by plaintiff's witness Raff (fol. 79 to 90). He is only one of many witnesses as to that point examined on the trial (*vid.* fol. 91), who prove the market value. Even defendant's own witness, Stewart (fols. 106, 107), proves some *market value.* The case of Merrill *v.* Grinell, 30 N. Y. 594, shows

that the opinions of witnesses may be received, as to the value of the chattels, from recently acquired knowledge and enquiries made.

The jury, therefore, had ample evidence on which to find value.

10th Point.—The exceptions (fol. 92 and 109) to the reservation of the reading of the deposition of the plaintiff's husband Fraloff to a later stage of the case, was a matter entirely within the discretion of the Court, and was, it is to be presumed, done for a proper and necessary reason —temporary absence of interpreter, or because the deposition could not be then found, or some other good reason.

11th Point.—The motion for *nonsuit*, at fols. 92 to 96, was properly refused.

The requests A and B under first request were fully charged by the Court, so far as they were matters of law, but the Court could not take from the jury the decision of the question of fact whether the property in suit, or any portion of it, was ordinary reasonable baggage. The jury did not find for full value proved, as appears by the proof, but gave such damages as in their judgment was an equivalent for the reasonable amount and value of baggage appropriated or destroyed by the defendants, and suitable to the plaintiff's condition in life.

This question and finding no Court in the United States could legally take from the jury (*vid.* this question more fully discussed *infra*, Point —.)

Request No. 2, that the jury must find directly that plaintiff was guilty of fraud, was again asking the Court to step beyond its province. It was a question for the jury, if for any one. Besides that, there *was no evidence whatever* of fraud.

The Requests 3, 4, 5 and 6 were requests to the Court to determine, as matter of fact, what was reasonable baggage or wearing apparel suitable for the plaintiff, and that she did not carry them as a passenger. The same objections as above apply. They are all questions of fact.

Requests 7, 8 and 9, that there was no evidence of any negligence on part of defendant, but that there was evidence of negligence on the part of plaintiff, were also questions of fact for the jury, and another attempt to get the Court to go out of its province.

It made no difference whether the defendants were guilty of negligence or not. They were common carriers as to the luggage, and answerable in any event.

Camden Co. *v.* Burke, 13 Wendell, 611.
Powell *v.* Myers, 26 Wend., 591.
Rawson *v.* Penn. R. R., 2 Abb. P. R., N. S., 220.

There was not a particle of evidence of negligence on the part of the plaintiff, and it is well established that the non-delivery of goods

intrusted to a carrier is a legal presumption of negligence on his part.

Steers *v.* Liv., N. Y. & Phil. S. Co., 57 N. York, p. 1.

The request No. 10, that the plaintiff, being a married woman, is not entitled to maintain the action, is fully answered by the evidence that her apparel was her separate property (*vide* fols. 34, 35).

The defendant would have to go back many years in the law to have such doctrine as he claims upheld; *vide* New York Code of 1848, sec. 114, allowing a married woman to sue alone when the action concerns her separate property. Also Rawson *v.* Penn. R. R., 2 Abb. Pr. R. (N. S.) 220, Gen. Term Sup. Court, holding positively that a married woman may sue a carrier for the loss of her luggage.

By Act of U. States of Sep. 24, 1789, Ch. 20, 1 Stat., at page 92, the laws of the several States are to be regarded as rules of decision in trials at common law in cases where they apply, and the rights of parties are to be adjudicated thereby. The jurisprudence of each State has not to be proved in the U. S. Courts, but is to be judicially taken notice of in the same.

Owings *v.* Hull, 9 Peters, 607.

Gordon *v.* Hobart, 2 Sumner, 401; 1 Gall, 518.

McNiel *v.* Holbrook, 12 Peters, 84.

12th Point.—The exceptions at fols. 96, 97, 98, 99, are almost too trivial for notice.

It appeared all through the plaintiff's evidence that the plaintiff was an invalid. The offers excepted to were of an offensive character, were not relevant to the issue, but designed to prejudice the jury. The case was tried all through by the defence in this manner.

The exception, fol. 101, as to the exclusion of what a witness *understood*, is also a trivial one.

As also to the *impression* of a United States Marshal, based upon his "acquaintance with mankind and his professional exertions," and as to what *he* thought of the mental condition of the plaintiff; and fol. 102, as to whether or not "*he felt sure* nothing had been lost from the trunk." The proffered testimony of the conductor that he saw nothing *unusual* in the baggage-car, and that the "reputation" of the baggage-master was "good," and as to the *average value* of baggage, fol. 103; and that "many passengers did not carry baggage at all;" and that "no claim similar to this had ever been made by any other lady;" and also fol. 104, as to the "general security of baggage transported by the railroads;" and also "whether it was *generally known* that rewards were offered, and no questions asked;" and fol. 105, as to the "*general sale* of coupon tickets," were also most trivial and irrelevant offers, and the testimony was properly excluded.

13th Point.—Another set of these trivial exceptions will be found fols. 105, 106.

These are offers on the part of defendant to *prove how much gold coin or currency would weigh, and the bulk thereof.*

They formed no part of the issue, and were quite irrelevant. They require no comment.

14th Point.—*Defendant's exceptions to the Judge's Charge, at* fol. 120.

As to No. 1, about "an expert thief." There is no such statement in the charge.

No. 2: The charge that the defendants were liable for the laces, no matter who took them, unless the party taking were acting under such circumstances as would authorize the defendants' agents to suppose he was acting for the plaintiff.

This is good law.

As to No. 3: The amount of baggage to be allowed.

The charge on this point was most carefully made, and covers the whole ground. It is found at fols. 112, 113, 114, 115, 116. It is to be taken as a whole, and leaves to the jury to find what were the "reasonable and usual articles" for the plaintiff to carry as a passenger.

As to No. 4: That the words "Weber may

have entered the different names to suit his own whims," are not found in the charge.

No. 5 is not an exception to any part of the charge.

No. 6: The Court made no such limitation as claimed. The words that were used were (fol. 112) "reasonable and usual." At fol. 118, "reasonable and proper."

No. 7: The charge about carriers being *quasi insurers* (fol. 119) was good law.

No. 8: There is nothing in the charge about "whole" journey, but about the character and nature of the journey as well (fol. 112).

But it is submitted as matter of law that the jury were bound to consider the whole journey upon which plaintiff had started. This question is fully adverted to in a subsequent point.

No. 9: The charge did not say the defendants admitted themselves common carriers; but said there was no dispute upon the evidence as to that point (fol. 110). At fol. 74, however, there is an *admission*, in *terms*, by defendants, that *they were* common carriers of passengers.

No. 10: Exception to that part of charge which treats of defendants' officers having reason to suppose, &c.

This exception is vague and unintelligible, and is too general to be worth anything.

No. 11: Exception to that part of charge, that jury might allow for portion of laces claimed, if not for all.

This is good law, and the charge on that point is correct (fol. 116).

No. 12: Exceptions to the principles of valuation of the laces as laid down in the charge (fol. 115, 116). The principles of valuation laid down by the Court were correct.

No. 13 (fol. 126): There is nothing in the charge with respect to fraud in the case, except what is found at fol. 122, which is in the defendants' favor.

There is no evidence of fraud, *pro* or *con*, in the Error Book.

No. 14 (fol. 126): The charge on this point was exactly in accordance with the facts and the *evidence*. There is no evidence to the contrary whatever in the Error Book, or elsewhere. There was no pretence, or scintilla of evidence, that the laces were delivered to the plaintiff at Niagara. The defendants never made any claim to it.

15th Point.—As regards, generally speaking, any technically illegal or improper testimony admitted, or portion of a charge made, the rule is as follows:

If any such, by some mistake, error or oversight, has been admitted, the principle established is, that if such testimony has *not prejudiced the general case*, or if the evidence was not *material*, or the verdict could be *justified without it*, or if a misdirection was on an immaterial point, or if the point taken was *frivolous*, or if upon the *whole evidence and law* applicable to the case the verdict was *legally justifiable*, under the general province of the jury, the *verdict should not be disturbed.*

Mansfield *v.* Wheeler, 23 Wend., 79.
Wallace *v.* King, 3 Barb., 548.
Horner *v.* Wood, 16 " 386.
Smith *v.* Kerr, 1 " 155.
Hunt *v.* Fish, 4 " 324.
R. R. Co. *v.* Smith, 21 Wallace, 256.
Walbrun *v.* Babitt, 16 Wallace, 577.
Allen *v.* Blunt, 2 Wood & Minot, 121, 152, 154.

Another rule is, that an erroneous assumption by a Judge in charging the jury, that there is no controversy upon a particular matter of fact, is not to be corrected by an exception, but by calling his attention to it at the time.

Hoffman *v.* Etna Fire Ins. Co., 1 Rob., N. Y. Supr., 501.
Affirmed on other grounds, 32 N. York, 405.

In this Court it is held, as the settled law of the Court, that if the charge given by the Court below covers the entire case, and submits it properly to the jury, such Court may refuse to

give further instructions. It is not required to follow the exact words of counsel or to repeat its charge. Also, that when instructions are asked in the aggregate, and there is anything objectionable in any of them, the Court may properly reject the whole.

Indianapolis &c. R. R. *v.* Horst, 3 Otto, 291.
Continental Co. *v.* Stead, 5 Otto, 161.
Moody *v.* Osgood, 54 N. York, 488.
Woodruff *v.* Hoff, 1 Otto, 596.
Klein *v.* Russel, 19 Wallace, 433.
Cauldwell *v.* N. Y. S. S. Co., 47 New York, 282.

16th Point.—*Defendant's Requests to Charge.*

These are 42 in number, many of them mere repetitions, and many frivolous and apparently intended to embarrass the Judge at the trial. Moreover, the exception to the Judge not charging the 42 requests is *general* (f. 134). Counsel was bound to call the attention of the Court to any particular request if it had not been charged.

Mutual Life Co. *v.* Snyder, 3 Otto, 393.

And again, the whole object of the rule requiring an assignment of errors is violated by preventing the Court or opposing counsel seeing on what precise points reversal was asked.

Philips *v.* Seymour, 1 Otto, 648.

In that case there were 52 assignments of error, and the Court severely condemned the

practice. On all substantial points requested the charge was made in substance as requested. This Court has held that a Judge is not bound to give instructions in the words in which they are asked. If those given sufficiently cover the case, the Court will not disturb the judgment.

Railway Co. *v.* McCarthy, 6 Otto, 258.

Request No. 3, that plaintiff did not show she carried the laces to wear "on the *journey*" to Niagara Falls, is quite frivolous—it would require a passenger to wear all his clothes at once on his person.

As to the requests Nos. 8, 9, 20. about fraud, they are generally repetitions of one another. From the beginning to the end of the case there was no evidence of fraud whatever.

Requests Nos. 5, 6, 10, 11, 35, are requests that the Court usurp the province of the jury, and find certain facts. This Court has held in Hannibal R. R. *v.* Swift, 12 Wall., 262, that if a carrier have any ground for refusing to take a passenger or his luggage, he is bound to insist upon it at the time upon such ground, if desirous of avoiding responsibility. If, not thus insisting, he receives the passengers and their baggage, his liability is the same as if no ground for refusal existed.

As to the claims made, Request 17, that the plaintiff *concealed her rank*, &c., the answer is, that there is no proof that she had any particular rank—merely that she was of a good family connection (f. 50).

The request No. 19, is that the Court charge as facts either assumptions of defendant's coun-

sel not appearing in the evidence as given by the record, or else small details of evidence. Such requests are held improper.

R. R. Co. *v.* Gladman, 15 Wallace, 401.
Storm *v.* U. S., 4 Otto, 76.
N. Y. Mutual Life Co. *v.* Baker, 4 Otto, 610.

As to the requests to charge, Nos. 3, 5, 14, 15, 22, 23, with respect to the nature and extent of the plaintiff's journey, the law governing this point was correctly laid down by the Court at fols. 111, 112, 118 and 119.

As to requests 30 and 31, as to plaintiff's "method" of treating the trunk, and her conduct, &c., it is ambiguous, and there is no evidence on such subjects. The charge fully covers the ground taken.

Nor is there the slightest evidence to sustain request 32, that trunk was insufficient protection for laces.

Requests 36 and 37, that jury must find that defendant has been guilty of *negligence* before recovery can be had, and that if plaintiff was guilty of negligence no recovery could be had. The first proposition is bad law, and there was no evidence to justify the second. The charge, fol. 118, sufficiently covers this.

Request 38 is a request to charge that plaintiff cannot recover if she made any misrepresentation in her deposition on the trial. This is absurd. It would make any mistake, or error of statement by a party, when examined as a witness, a defense in bar.

The 41st request to charge is a request almost exactly in accordance with the judge's charge,

practice. On all substantial points requested the charge was made in substance as requested. This Court has held that a Judge is not bound to give instructions in the words in which they are asked. If those given sufficiently cover the case, the Court will not disturb the judgment.

Railway Co. *v.* McCarthy, 6 Otto, 258.

Request No. 3, that plaintiff did not show she carried the laces to wear "on the *journey*" to Niagara Falls, is quite frivolous—it would require a passenger to wear all his clothes at once on his person.

As to the requests Nos. 8, 9, 20. about fraud, they are generally repetitions of one another. From the beginning to the end of the case there was no evidence of fraud whatever.

Requests Nos. 5, 6, 10, 11, 35, are requests that the Court usurp the province of the jury, and find certain facts. This Court has held in Hannibal R. R. *v.* Swift, 12 Wall., 262, that if a carrier have any ground for refusing to take a passenger or his luggage, he is bound to insist upon it at the time upon such ground, if desirous of avoiding responsibility. If, not thus insisting, he receives the passengers and their baggage, his liability is the same as if no ground for refusal existed.

As to the claims made, Request 17, that the plaintiff *concealed her rank*, &c., the answer is, that there is no proof that she had any particular rank—merely that she was of a good family connection (f. 50).

The request No. 19, is that the Court charge as facts either assumptions of defendant's coun-

sel not appearing in the evidence as given by the record, or else small details of evidence. Such requests are held improper.

R. R. Co. *v.* Gladman, 15 Wallace, 401.
Storm *v.* U. S., 4 Otto, 76.
N. Y. Mutual Life Co. *v.* Baker, 4 Otto, 610.

As to the requests to charge, Nos. 3, 5, 14, 15, 22, 23, with respect to the nature and extent of the plaintiff's journey, the law governing this point was correctly laid down by the Court at fols. 111, 112, 118 and 119.

As to requests 30 and 31, as to plaintiff's "method" of treating the trunk, and her conduct, &c., it is ambiguous, and there is no evidence on such subjects. The charge fully covers the ground taken.

Nor is there the slightest evidence to sustain request 32, that trunk was insufficient protection for laces.

Requests 36 and 37, that jury must find that defendant has been guilty of *negligence* before recovery can be had, and that if plaintiff was guilty of negligence no recovery could be had. The first proposition is bad law, and there was no evidence to justify the second. The charge, fol. 118, sufficiently covers this.

Request 38 is a request to charge that plaintiff cannot recover if she made any misrepresentation in her deposition on the trial. This is absurd. It would make any mistake, or error of statement by a party, when examined as a witness, a defense in bar.

The 41st request to charge is a request almost exactly in accordance with the judge's charge,

and in opposition to many of the other requests.

17th Point.—Now, as to the correctness of the law laid down by the Judge below, that carriers are responsible for reasonable and ordinary baggage for the journey, according to the passenger's condition, we claim that the plaintiff can recover for the value of such articles of baggage as are shown to be suitable to her station in life; and the value and amount is to be estimated, not for the mere piece of her transit on which the baggage was lost, but may embrace the general contemplated journey, and include such an allowance for apparel, under various circumstances or accidents, and for sojourning by the way, as a reasonably prudent person would consider it necessary to make.

Merrill *vs.* Grinnell, 30 N. Y., 594.

In Nevins *vs.* Bay State, 4 Bos., 225, it is held that in determining what amount of baggage plaintiff might reasonably have had, the jury might take into view his residence, business, station in life, place from which he came, and whither he was going.

In Merrill *vs.* Grinell, 30 New York, 594, plaintiff was allowed to recover for money in his trunk sufficient for his whole contemplated journey, and the amount was, it was held, *a question for the jury*, and should not be disturbed by the Court.

Furthermore, the question what articles in a passenger's trunk were necessary for the journey, is a *question of fact to be determined by the jury.*

Rawson *vs* Penn. R. R. Co., 2 Abb., N. S, 220.

Merrill *vs.* Grinnell, 30 N. Y. (*supra*), 594.

Whether, therefore, the articles lost were or were not *ordinary* and reasonable *luggage* under the circumstances of the case, was a question of *fact for the jury*, and the general evidence in this case showed (by plaintiff's deposition, *Mrs. Carter*, Von Weber, Mrs. Horn and other witnesses) that the laces lost were commonly worn by the plaintiff, and could be changed from one dress to another, and were so used by her, and that they were part of a lady's dress generally worn by people of her position in life.

The plaintiff brought them to wear in this country, as she states, never parted from them, went to operas, theatres, etc., in them, desired to appear to advantage here by wearing them, probably did wear them at different times and on different visits, so far as her illness and the limited time she was here allowed her, and would have worn them further if the defendants had not prevented her by abstracting them.

As to the great value of the laces claimed, we have not claimed their full value, nor have the jury given it to us. All we have claimed is a reasonable satisfaction for such part of the loss as we would be *entitled to recover under such circumstances.* What is a *reasonable* amount was *properly, under the Court's direction*, left to the

and in opposition to many of the other requests.

17th Point.—Now, as to the correctness of the law laid down by the Judge below, that carriers are responsible for reasonable and ordinary baggage for the journey, according to the passenger's condition, we claim that the plaintiff can recover for the value of such articles of baggage as are shown to be suitable to her station in life; and the value and amount is to be estimated, not for the mere piece of her transit on which the baggage was lost, but may embrace the general contemplated journey, and include such an allowance for apparel, under various circumstances or accidents, and for sojourning by the way, as a reasonably prudent person would consider it necessary to make.

Merrill *vs.* Grinnell, 30 N. Y., 594.

In Nevins *vs.* Bay State, 4 Bos., 225, it is held that in determining what amount of baggage plaintiff might reasonably have had, the jury might take into view his residence, business, station in life, place from which he came, and whither he was going.

In Merrill *vs.* Grinell, 30 New York, 594, plaintiff was allowed to recover for money in his trunk sufficient for his whole contemplated journey, and the amount was, it was held, *a question for the jury*, and should not be disturbed by the Court.

Furthermore, the question what articles in a passenger's trunk were necessary for the journey, is a *question of fact to be determined by the jury.*

Rawson *vs* Penn. R. R. Co., 2 Abb., N. S, 220.

Merrill *vs.* Grinnell, 30 N. Y. (*supra*), 594.

Whether, therefore, the articles lost were or were not *ordinary* and reasonable *luggage* under the circumstances of the case, was a question of *fact for the jury*, and the general evidence in this case showed (by plaintiff's deposition, *Mrs. Carter*, Von Weber, Mrs. Horn and other witnesses) that the laces lost were commonly worn by the plaintiff, and could be changed from one dress to another, and were so used by her, and that they were part of a lady's dress generally worn by people of her position in life.

The plaintiff brought them to wear in this country, as she states, never parted from them, went to operas, theatres, etc., in them, desired to appear to advantage here by wearing them, probably did wear them at different times and on different visits, so far as her illness and the limited time she was here allowed her, and would have worn them further if the defendants had not prevented her by abstracting them.

As to the great value of the laces claimed, we have not claimed their full value, nor have the jury given it to us. All we have claimed is a reasonable satisfaction for such part of the loss as we would be *entitled to recover under such circumstances.* What is a *reasonable* amount was *properly, under the Court's direction*, left to the

jury, they having the right to apply their *reason* and their *judgment* to the *case, under all the evidence* given, just as they are always allowed to do in cases of this character, as is well sustained by authority.

Laces were evidently, by the common law, articles for the value of which a loss could have been recovered. The fact of the special exemption of them and other articles under the *English Carriers* Act demonstrates that, and various cases have been decided in England and this country allowing recoveries for articles of the like character.

Cases show that judgments have been recovered against carriers as baggage for *duelling pistols* (13 Ill., 746); *valuable jewelry* (3 Barr. 451; Rawson *v.* Penn. R. R., 2 Abb. N. Y., N. S., 220); *five franc pieces* (16 Penn. State, 67); *feather beds, looking glasses, dishes* (22 Ill., 212); *watches* (10 Ohio, 145); *money* (Merrill *v.* Grinnell, 30 N. York, 594); *manuscript books* (Hopkins *v.* Westcott, 6 Blatch., 64).

There are many other cases, showing that articles of this character, and even those which are for the *convenience* and *comfort*, as well as the *necessity* of the traveller, are subject-matter for a recovery.

In Dexter *v.* Syracuse, &c., R. R., 42 N. York, 326, plaintiff, a traveller, was allowed to recover for articles received as baggage designed for use by members of his family, although not intended for his use on the journey, including materials for two dresses for his family.

In Glasgow *v.* N. Y. C. R. R., 36 Barb., 558, the Court held that a plaintiff was entitled to

recover for whatever the carrier had received as baggage. If it is taken as the baggage of the passenger, whether ordinary or extra, it is to be delivered.

In Nevins *v.* Bay State Steamboat Co., 4 Bosworth (N. Y.) 225, the Court lays down the rule that the jury may take into consideration what the traveller has been in the habit of carrying in his travels for his personal convenience, or what a person so circumstanced *is ordinarily in the habit of carrying.* It is a question for the *jury* to decide, under all the circumstances.

18th Point.—A claim has been made to set aside the verdict because the damages are deemed high, and unwarranted by the evidence.

The ground for setting aside a judgment for excessive damages seems only to prevail in cases of *torts*, where the damages are of a punitory nature, and where the amount rendered shows that the jury must have been actuated by some extraordinary mistake, passion, partiality or corruption; and it is only in very *rare* cases the court disturbs a verdict on such a ground. Among the cases on the subject which may be referred to, are:

Curtis *vs.* R. & S. R. R., 20 Barb., 282.
Travis *vs.* Barger, 24 Barb., 614.

In Travis *vs.* Barger, *supra*, 24 Barb., the court says: The Court will not undertake on a *question of damages to set their judgment in opposition to that of the jury.*

See also Ingerson *vs.* Miller, 47 Barb. 47.

The United States Courts have also held that the question of *damages* belongs peculiarly to the jury; and although the *Court* may be dissatisfied with the verdict, they will not set it aside simply on that ground.

Walker *vs.* Smith, 4 Dall., 389.
Allen *vs.* Blunt, 2 Wood & Min., 121–149.
Stanley *vs.* Whipple, 2 McLean, 35.

The United States cases also hold, as do the State Courts, that they will not set a verdict aside on the ground of excessive damages, unless there has been some *extraordinary mistake.*

Alden *vs.* Dewey, 1 Story C. Court, 336.
Palmer *vs.* Fiske, 2 Curt. C. Court, 14.
St. Martin *vs.* Desnoyer, 1 Minn., 156.

There is no *arbitrary rule* about the amount of damages to be allowed, and the rule with reference to excessive damages is never applied, where there has been proof of value and loss equal to the value, unless there has been some extraordinary or outrageous case of fraud.

The defendant has claimed there is no reported case of so great damages recovered in such a case.

The answers are:

I.—Reported cases do not generally give the *amount* of damages, inasmuch as they generally turn upon some other point than the question of damages.

II.—The value of money was very different from what it was at the time of loss. $10,000 *at the time of the verdict* would bring no more than $5,000 at the time of the loss.

III.—The jury allowed plaintiff *no interest*, and these damages are in partial consideration for six years' interest on the amount of the loss.

IV.—The *great expenses of a trial* of this character should also be contemplated, and the enforced sojourn in New York of the plaintiff and her relative for *several months*, and their expenditures for *detectives and otherwise while endeavoring to recover the lost stolen property*, and for the institution of the action.

The case of Snyder *v.* Jenkins, 3 Sand. Superior Court, 614, holds that parties suing in cases of this character are entitled to a full indemnity.

Lord Mansfield stated, in the case of Gilbert *vs.* Berdinshaw, Cowper, 230, that new trials are not to be granted for excessive damages without very strong grounds indeed, and such as carry internal evidence of *intemperance in the minds of the jury.*

So Justice Story has observed that a court of *law* will not set aside a verdict upon the ground of excessive damages, unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law.

Wiggin *vs.* Coffin, 3 Story, 1.

And in another case he states: "The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give, and I should now be better satisfied if the amount had been less. It is one thing for a Court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because it exceeds that measure. Upon a mere matter of damages, *where different minds might and probably would arrive at different results*, and nothing *inconsistent with an honest exercise of judgment* appears, I for one should be disposed to leave the verdict as the jury found it.'

Thurston *v.* Martin, 5 Mason, 197.

Shaw *v.* Boston & Worcester R. R. Co., 8 Gray (Mass.), 45.

This verdict is *not* a large one. The $10,000 damages given, *without* interest, would not be more than $7,400 with the interest calculated from the time of loss to the time of the verdict.

Besides, the plaintiff was entitled to a full indemnity, and the jury had a right to consider, besides, the value of the property lost, the value of its use from the time of its loss until the time of verdict. In this case it was over five years.

Suydam *v.* Jenkins, 3 San. Sup'r Court, N. Y. R., 614; approved, Scott *vs.* Rogers, 31 N. Y., 676.

It will be observed also that the appeal is not on a case made, but merely on *specific exceptions in error.*

The amount of damages found, therefore, cannot really be in question here, and cannot affect the ruling of this Court on this appeal.

If the damages were deemed excessive, then a motion might have been made for a new trial on that ground specifically, and an appeal taken from any order denying such motion. In fact, such a motion was made in this very case, and denied, and a long opinion rendered. (Vide *Opinion of Wallace, J.*, 12 Blatchford Circuit Ct. Rep., 484, Fraloff *vs.* N. Y. C., &c., R. R.)

There has been no appeal from that order or from that decision.

The matter is *here* merely on questions of law presented in the Error Book, and the Court cannot properly go beyond it.

It is well settled that such questions only as are specified in the assignment of error are open to the plaintiff in error, and a general assignment that the decision has been for the wrong party presents nothing for review.

Schuyler *v.* Reid, 23 Wallace, 345.

The verdict of the jury, therefore, fixing the damages of the defendant in error, will not be disturbed by this Court.

The Court below, at page 42, fols. 112, 113, 114, correctly laid down the law governing the jury in their deliberations, and there being no material error in such charge, the verdict must stand.

It has been the settled law governing this class of actions, that it was peculiarly the

province of the jury to say what was the reasonable baggage of a passenger, and what it was worth.

In the case of Rawson *v.* Penn. R. R., 2 Abb. R., N. S., p. 220, the General Term of the Supreme Court of New York holds the extent to which the carriers are liable is a question solely for the jury. The kind and quantity of the materials constituting the baggage of a traveler must depend upon his tastes and habits, his pecuniary circumstances, his position in society, and the convenience and necessities of the particular journey.

Only a small portion of the evidence is given in the Error Book, in accordance with the rules of the Court.

The jury found, on the submission of the case to them under the Judge's charge, as *matters of fact*, that the articles, so far as they assessed their value, were comprised under the head of ordinary reasonable baggage of the plaintiff for the purpose of her journey. It will be observed that they only awarded compensation for a *portion* of the laces stolen, *i. e.*, such as the plaintiff, under the circumstances, as a passenger, ought to recover.

Judge Wallace, in his opinion above referred to, states: "If the question was properly left for the jury to decide as one of fact, the value of the articles was peculiarly for their consideration, and abundant testimony was before them to sustain the conclusion they reached." * * * * Also, p. 489:

"If the Court can set aside the verdict because it appears that the property was of greater value than the Judge deems it reasonable that a traveler should carry, the question is no longer one of fact for the jury, but one of law for the Court. If it is to be decided as matter of *law*, what standard of value is to be adopted?" * * * "To this proposition I cannot assent. If carried to its logical conclusion, it would abrogate the functions of the jury as to cases of this class."

Facts found by a jury could only be re-examined, under the rules of the common law, either by the granting of a new trial by *the Court where the issue was tried*, or to which the record was returnable, or by the Appellate Court for some error of *law*.

Ins. Co. *v.* Folsom, 18 Wallace, 237, 248.

That case was affirmed Cooper *v.* Omohundrow, 19 Wal., 65, holding that on a general finding of fact there could be no review in this Court, and that *questions of fact will not be reviewed by this Court in common law actions.*

Cruise *v.* Brewer, 19 Wall., p. 70.

U. S. *v.* Smith, 4 Otto, 214.

This right to a trial by jury is one of the most sacred of the rights of the citizen, guaranteed by the Constitution of the United States and the various States. The claim is made to set aside their finding on competent evidence, for the reason that the Court should,

at the instance of appellant, after a ten years' expensive litigation, usurp the province of the jury, and say what should or should not be their verdict.

The Constitution of the United States, Art. VII.: "In writs at common law, where the value in controversy shall exceed $20, the right to trial by jury shall be observed; and *no facts* tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

It has been remarked by one of our most learned jurists, as follows: "It was not the intention of Congress, by the general language of the Act of 1824, to alter the appellate jurisdiction of this Court, and to confer upon it the power of granting a new trial by a re-examination of the facts tried by a jury. The trial by jury is justly dear to the American people. It has been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Opinion in Parsons *v.* Bedford, 3 Peters, 433.

When there is evidence on both sides on a question of fact, the verdict of a jury, where there is no important error of law in the course of the trial, is considered decisive, conclusive and *sacred.*

Smith *v.* Tiffany, 36 Barb. N. Y., 23.
Henitage *v.* Hall, 33 *id.*, 347.
Bert *v.* Stach, 24 How., 58.
Fry *v.* Bennett, 9 Abb., N. Y., 45, and cases.

Mays *v.* Fritton, 20 Wallace, 414.
Express Co. *v.* Ware, 20 Wallace, 543.

So, in Walker *v.* Smith, 4 Dall, 362, the Court says (Washington, J.), on a motion for a new trial, that although *he* was not satisfied with the verdict, yet the question of damages belonged so peculiarly to the jury that he could not allow himself to *invade their province.*

Adams *v.* Midland R. R. Co., 531 L. J. R., N. S., Exch., 35.
Penn. R. R. *v.* Goodman, 62 Penn. State, 329.

The Court refused to grant a new trial where the evidence submitted to the jury was such as it was peculiarly their right to decide upon, and also where the construction given to the evidence by the jury appeared to be consistent with the justice of the case.

3d Circuit Pa., Blagg *v.* Phœnix Ins. Co., 3 Wash. C. Ct., 58.

In Tioga R. R. *v.* Blossbury R. R., 20 Wallace, 137, Mr. Justice Bradley states that no error can be assigned on questions of fact where they are not put upon the record. In this Error Book it is to be observed that only a portion of the evidence is given.

19th Point.—The judgment of the Circuit Court should be affirmed with costs.

PLATT, GERARD & BOWERS,
Att'ys for Defendant in Error.
JAMES W. GERARD,
Of Counsel.